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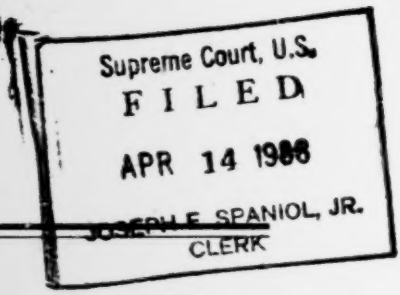

No.

IN THE

Supreme Court of the United States

October Term 1985

NANCY C. CARNEY, DIRECTOR OF EMPLOYEE RELATIONS FOR THE CITY OF GARLAND, *et al.*,

Petitioners,

v.

DEAN WHITAKER

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

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Dated: April 11, 1986

Questions Presented

1) Whether the employer's act of disclosing the names of complainants and victims of harassment to the general public or to individuals against whom a complaint has been made, is an act inconsistent with a law providing for equal rights, principally 42 U.S.C. § 2000e-3, where retaliation will occur if the indentities of the complainants are disclosed.

2) Whether an employer, even a public employer acting under color of law, has no duty to establish procedures to prevent harassment of its employees, either in or out of the workplace but occurring because of their employment, since the "expected response," as stated by the Court of Appeals, is to file a complaint with EEOC or the courts.

3) The Court of Appeal's decision that there existed no duty to protect the identity of a confidential informer under Title VII is in direct conflict with *In re Quarles*, 158 U.S. 532, 15 S.Ct. 959 (1895), which held an informer has the right to be protected against retaliation, as well as decisions in other circuits of the Court of Appeals, principally *Rutherford v. American Bank of Commerce*, 565 F.2d 1162, 1165 (10th Cir. 1977), *Pantchenko v. Dolge Co. Inc.*, 581 F.2d 1052, 1055 (2nd Cir. 1978), and *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985), *cert. granted, Meritor Savings Bank FSB v. Vinson*, —U.S.—, 106 S.Ct. 57 (1985).

Parties

In addition to Nancy C. Carney whose name appears in the caption, petitioners include: City of Garland, Texas and Dean Ransom, Assistant City Manager.

Dean Whitaker is the only Respondent.

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1. This case is important because the Court of Appeals decision which held there exists no duty to prevent harassment and retaliation against its employees and no duty to protect the identity of a confidential whistleblower under Title VII is in direct conflict with *In re Quarles*, 158 U.S. 532, 15 S.Ct. 959 (1985), which held an informer has the right to be protected against retaliation, as well as other decisions under 42 U.S.C. § 2000e-3 in other circuits of the Court of Appeals, principally *Rutherford v. American Bank of Commerce*, 565 F.2d 1162, 1165 (10th Cir., 1977), *Pantchenko v. Dodge Co., Inc*, 581 F.2d 1052 (2nd Cir. 1978), and *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985), *cert. granted* 106 S.Ct. 57 (1985) 7

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No.

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OCTOBER 1986

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v.

DEAN WHITAKER

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

OPINIONS BELOW

The December 10, 1985 opinion of the Court of Appeals for the Fifth Circuit is reported at 778 F.2d 216 and is appended herein as Appendix "A". The Judgment of Court of Appeals is appended herein at A-16.

The January 14, 1986 Order denying the Petitioners Motion for Rehearing is appended hereto as Appendix "B".

The July 13, 1984 Order of the District Court, Northern District of Texas, is appended hereto as Appendix C.

JURISDICTION

On January 14, 1986, the Court of Appeals entered an Order denying Petitioner's Motion For Rehearing which had been timely filed on December 26, 1985, the Fifth Circuit Clerk's Office being closed on December 24-25, 1985 for the Christmas holidays. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1) and 28 U.S.C. § 1447(d).

CONSTITUTIONAL PROVISIONS, ACTS, STATUTES AND REGULATIONS INVOLVED

United States Constitution, Fourteenth Amendment; 42 U.S.C. 2000e-3; 42 U.S.C. § 2000e-2; 42 U.S.C. § 2000e-3; 28 U.S.C. § 1443; 28 U.S.C. § 1447; Texas Revised Civil Statutes Annotated Art. 6252-17a Sec. 3(a) (1), (2), (3); Sec. 4; Sec. 5; Sec. 7; Sec. 8, Sec. 10.

FACTS

To protect certain of its employees from retaliation in violation of 42 U.S.C. § 2000e-3, Petitioners City of Garland, Texas, Dean Ransom and Nancy Carney removed this mandamus case from state court to federal district court. Petitioners stated under oath the factual basis for removal as follows:

> "Whitaker, while employed by Petitioner City, attempted to retaliate against certain of these employees for making their complaints of civil rights violations by Whitaker. Your Petitioners believe that the release of such documents to Whitaker would result in further retaliation by Whitaker against these employees."

Petition For Removal, filed March 16, 1984. (R.7).

These factual allegations made under oath were never denied by Whitaker in his Motion to Remand. (R.27-40).

Respondent Whitaker filed suit after he resigned his employment in a state district court of the state of Texas against Petitioners Nancy Carney, Dean Ransom and the City of Garland, Texas (the "City")[1] seeking to compel through a Writ of Mandamus the production under the Texas Open Records Act, Tex.Rev.Civ.Stat.Ann. art. 6252-17a (Vernon Supp. 1985) of alleged documentary evidence of complaints of harassment in violation of Title VII made against him by subordinate employees while he was employed with the City (A-4, A-6, R.3).[2]

The District Court, *without a hearing on the factual merits* or making any factual determinations, remanded the case back to state court without any written reasons or opinion. (A-7, R.41). The City timely filed an appeal to the Court of Appeals for the Fifth Circuit. (A-7 to A-8).

The City had removed the case from the state court under 28 U.S.C. 1443(2) on the grounds that disclosure of the identities of those who may have complained about Whitaker would be an act inconsistent with a law providing for equal rights, principally 42 U.S.C. § 2000e-3. (A-6 to A-7; R.7). Title VII specifically forbids racial and sexual discrimination, including harassment of an individual because of his race or sex, in the place of employment. Even more specifically, Title VII outlaws any discrimination against an individual who may have opposed or complained against such treatment. 42 U.S.C. § 2000e-3.

The position of the City was that disclosure of the identities of the complainants and the nature of their complaints would constitute discrimination and retaliation against these victims solely for the reason they had opposed the

[1]The "City" is used to collectively describe the Petitioners Nancy Carney, Dean Ransom and the City of Garland.

[2]The use of (A-) is to the opinion of the Court of Appeals appended in the appendix (R.) is reference to the record before the Court of Appeals.

alleged sexual harassment by Whitaker, especially since Whitaker "while employed, had attempted to retaliate against certain of these employees for their making complaints of civil rights violations by Whitaker." Petition For Removal (R.7).[3] The city also maintained that confidentiality was necessary to avoid a "chilling effect" on the proper functioning of the grievance mechanism. (A-7).[4]

Nancy Carney, Director of Employee Relations and Dean Ransom, Assistant City Manager, received a number of complaints of sexual harassment from employees of the City against Dean Whitaker, the Respondent, who at the time was the Director of Accounting for the City of Garland, Texas. (A-5). The City began an investigation of these complaints pursuant to a grievance procedure which provided for the confidentiality of the complainants' identities for the obvious purpose of remedying discrimination internally by encouraging alleged victims of race or sexual harassment to voice their complaints without fear of retaliation nor forcing them to expose themselves to the hazards and uncertainties

[3]*See e.g. Rutherford v. American Bank of Commerce*, 565 F.2d 1162 (10th 1977), where the Tenth Circuit held the act of a past employer in disclosing to a prospective employer the fact that an individual had filed an EEOC complaint constitutes retaliation under 42 U.S.C. 2000e-3.

[4]The evidence on the question of the effectiveness of a grievance mechanism suggests that the mere existence of a grievance mechanism is not by itself effective. *See* Staff of House Subcomm. on Investigations of the Comm. on Post Office and Civil Service 96th Congress 2d Session, *Sexual Harassment in the Federal Government*, 11-13 (Comm. Print 1980). Where the mechanism is sufficiently sensitive, as in the case of the City's employees being assured anonymity to avoid the chilling effect noted by the Court of Appeals (A-4, A-7), employees in fact tend to use it before turning to the difficult course of litigation. *See* Rowe, *The Non-Union Complaint System at MIT: An Upward-Feedback Mediation Model*, 2 alternatives to the High Cost of Litigation 10 (1984). This is precisely what occurred in the case of Whitaker, where the victims were not forced to take legal action to prevent further harassment.

which result from filing an EEOC complaint or a lawsuit. (A-4, A-5).[5] No EEOC complaints or lawsuits were filed by the affected employees, a fact noted by the Court of Appeals but without properly recognizing the fact that this confidential procedure had remedied the harassment problems without further legal action being necessary by the victims. (A-6).

Another fact which was not noted by the Court of Appeal was that during the course of this investigation, Whitaker attempted to retaliate against certain employees because he thought they may have been the source of these complaints. (R.7).

Before this investigation was completed, Whitaker submitted his resignation during a meeting with Dean Ransom on the morning of March 30, 1983. (A-5). Only after more than ten months had elapsed following Whitaker's resignation, did Whitaker file suit in state district court of the State of Texas.

Upon appeal of the district court's remand to state court, the Court of Appeals addressed the issue of whether disclosure of the identities of the complainants would be an act inconsistent with Title VII. (A-14). The Court of Appeals held that Title VII placed no affirmative duty upon the employer to institute an anonymous and confidential grievance procedure, (A-9), stating that the "expected response" is a Title VII action "through the EEOC or the courts". (A-12, n.6). As part of its rationale, the Court of Appeals attempted to distinguish between disclosure to the public and disclosure to an alleged aggrieved former employee. (A-13).

But as noted by the Court of Appeals in its own opinion, under Tex.Rev.Civ.Stat.Ann. art. 6252-17a § 3(a)(2) (Ver-

[5] *Id.*

non Supp. 1985), Whitaker's personnel file is the only such file Whitaker might be entitled to access solely as a former employee. (A-6, n.3). Therefore Whitaker's standing to obtain such information is the same as any other member of the general public.

In the pleadings, Whitaker never stated he sought the documentary evidence solely as a former employee, but stated it was *public* information. (R. 12-13). The City responded in its Answer that such information was confidential, and this confidentiality was necessary to prevent retaliation by not only Whitaker, but by anyone who possesses the same standing as a member of the general public, as well as to assure proper functioning of the grievance mechanism. (A-4, A-7; R.22-24).

Since the district court never held any hearing on the factual merits, the courts have never determined the purpose of Whitaker's request for information to be other than that alleged by the City. The City, in its Petition For Removal, alleged that Whitaker had already attempted to retaliate while still an employee of the City, and believed the purpose in seeking the information was to attempt further retaliation. (R.7). Whitaker in his Motion to Remand, never denied these factual allegations. (R27-40).

Where the fact that an individual filed an EEOC complaint has been disclosed by a past employer to a prospective employer, the courts have held such an act to constitute discrimination or retaliation in violation of 42 U.S.C. 2000e-3. *Rutherford v. American Bank of Commerce,* 565 F.2d 1162 (10th Cir. 1977); *Pantechenko v. Dolge Co., Inc.,* 581 F.2d 1052 (2nd Cir. 1978). Indulging the same factual indulgences in favor of the City, it can only be presumed that Whitaker's purpose in seeking to force disclosure of the

information is to retaliate against the complainants by whatever means available, legal or otherwise.

REASONS FOR GRANTING THE WRIT

This case is important because the Court of Appeals' decision which held there exists no duty to prevent harassment and retaliation against its employees and no duty to protect the identity of a confidential whistleblower under Title VII, is in direct conflict with *In re Quarles*, 158 U.S. 532, 15 S.Ct. 959 (1895), which held an informer has the right to be protected against retaliation, as well as decisions under 42 U.S.C. § 2000e-3 in other circuits of the Court of Appeals, principally *Rutherford v. American Bank of Commerce*, 565 F.2d 1162, 1165 (10th Cir. 1977), *Pantchenko v. Dolge Co., Inc.* 581 F.2d 1052, 1055 (2nd Cir. 1978), and *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985) *cert. granted*, 106 S.Ct. 57 (1985).

The decision by the Court of Appeals condemns many victims of discrimination who are afraid of retaliation to suffer their harassment in silence. The decision acts to insulate all employers from liability for their failure to establish a sensitive, effective grievance system where employees may report harassment. Even worse, the opinion evicts these victims from the shelter of confidentiality which was expressly designed to protect them from retaliation.

In 1895, the Supreme Court of the United States held that a citizen is entitled to freely notify his government of violations of the law and that the government has a *duty* "... to protect him while so doing or on the account of so doing." *In re Quarles*, 158 U.S. 532, 536, 15 S.Ct. 959, 961 (1895). The duty of the City towards protecting its own employees

should be at least as strong as that in *Quarles, supra.* The Court of Appeals decision is not only in error because it ignores 42 United States Code, Section 2000e-3, the holding is itself morally wrong because it ignores one of the most fundamental duties of a government, a duty recognized by the Supreme Court in 1895, to protect an individual who has responded to an offer to communicate in confidence on possible violations of the law.

If there is such a duty to protect the private citizens, then how much stronger and clearer is the duty where the employees of a government come forward after an offer of confidentiality regarding the actions of a supervisor violating Title VII and the Fourteenth Amendment? To paraphrase the Supreme Court, the employee should have the same rights and duties:

> It is likewise his right and duty to communicate to the executive officers any information which he has of the commission of an offense against those laws; and such communication given by a private citizen is a privileged and confidential communication, for which no action of libel or slander will lie, and the disclosure of which cannot be compelled without the assent of the government.

In re Quarles, 158 U.S. at 537; 15 S.Ct. at 961.

Further once the City began an investigation to ascertain whether its employees were being deprived of rights guaranteed to them by the Fourteenth Amendment, Sec. 1 and Title VII, a special relationship was created requiring the City to take reasonable precaution to protect these employees. But even more important than the duty of protecting the individual's safety, is the duty to protect the operation of government itself:

> This duty does not arise solely from the interests of the party concerned, but from the necessity of the government itself that its service shall be free from adverse influence of force and fraud practiced on its agents.

In re Quarles, 158 U.S. 532, 536, 15 S.Ct. 959, 961 (1895).

To hold otherwise would act to insulate corruption and remove all protection against retaliation by corrupt officials. This is precisely the effect of the opinion of the Court of Appeals.

The Court of Appeal's decision completely omits from its consideration the mandate of 42 United States Code, Section 2000e-3 which makes it an unlawful employment practice for an employer to discriminate against an employee "because he has opposed any practice made an unlawful employment practice by this title." The Court of Appeal's holding is deceptively simple, but in error: Title VII does not forbid disclosure of the identity of a whistleblower and the nature of the complaint to a former employee under the Texas Open Records Act.[6]

The Court of Appeal's opinion ignores the fact that the release of this information is sought by the same person against whom the victims blew the whistle. (R.7). It overlooks the fact that Whitaker attempted to retaliate against these whistleblowers before he resigned his position. *Id.*

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[6]Under the Texas Open Records Act, Tex.Rev.Civ.Stat.Ann. art. 6252-17a, all exceptions to disclosure are strictly construed in favor of disclosure. Sec. 3(a)(3) quoted by the Court of Appeals as being an exception to disclosure, actually relates to attorney-work product type of material involved in litigation. The *only* exception which may act to prevent disclosure is art. 6252-17a Sec. 3(a)(1), "information deemed confidential by law, either Constitutional, *statutory*, or by *judicial* decision." (emphasis added). The only basis for the information to be deemed confidential by law is Title VII. If the decision of the Court of Appeals that nothing in Title VII prevents disclosure remains intact, then nothing else in the Open Records Act may act to prevent disclosure.

The Court's opinion overlooks the fact that if Whitaker has standing, it is as a member of the general public, since the documents, if any, are not in Whitaker's personnel file. Tex.Rev.Civ.Stat.Ann. art. 6252-17a, Sec 3(a). (A-6 n.3). If Whitaker has standing, then so does any other member of the general public including prospective employers of the complainants.

Where the possibility exists for retaliation in other areas of federal regulation and law, the identities of informers should remain confidential due to the possibility of retaliation by past present or future employers. *Hodgson v. Charles Martin Inspectors of Petroleum,* 459 F.2d 303 (5th Cir. 1972). In directly applying this rationale to a Title VII case, the Tenth Circuit held releasing the information to a prospective employer that a former employee had filed an EEOC complaint, constituted retaliation by the employer. *Rutherford v. American Bank of Commerce,* 565 F.2d 1162, 1166 (10th Cir. 1977).

Similar holdings were reached in *Pantchenko v. Dolge Co., Inc.,* 581 F.2d 1052, 1055 (2nd Cir. 1978), where the Second Circuit held the allegation that the refusal of the employer to provide a reference was in retaliation for filing EEOC complaint was sufficient to avoid a motion for summary judgment. In the case of *Czarnowski v. DeSoto, Inc.,* 518 F.Supp 1252, 1259 (N.D. Ill. 1981), the district court held disclosure that plaintiff filed an EEOC charge against defendant establishes a prima facie case of retaliation.

Other actions which have been held to constitute retaliation include an individual receiving harassing phone calls from a supervisor and his wife over an EEOC complaint, *Toscano v. Nimmer,* 570 F.Supp. 1197 (D.C. Del. 1983), and a state court action defamation action filed in bad faith

against an employee for filing an EEOC complaint. *EEOC v. Levi-Strauss*, 515 F.Supp. 640 (N.D. Ill. 1981).

Indeed, where a government agency has *failed* to protect a whistleblower, liability has been imposed upon the government agency for its failure to protect. In *Swanner v. U.S.* 309 F.Supp. 1183, 1187 (W.D. Ala. 1970), the court imposed tort liability for failure to protect an informer, without requiring the informer to have requested assistance.

In *Miller v. U.S.* 561 F.Supp. 1129, 1136 (E.D. Penn. 1983), the district court imposed tort liability based on a special relationship arising from the solicitation of information, a response by the plaintiff giving the government valuable information and knowledge that the plaintiff may be endangered. The facts of this present case before this Honorable Court consists of an investigation which solicited information via an offer of confidentiality, a response by the victims and an attempt by Whitaker to retaliate. (A-7). This attempted retaliation provides more than enough reason to believe the whistleblowers might be endangered if the information is released.

Clearly, if disclosure of this information to a prospective employer would subject the City to liability per *Rutherford v. American Bank of Commerce, supra,* then disclosure to Whitaker, who has already attempted retaliation and has only the same standing as any member of the general public including prospective employers, would equally violate 42 U.S.C. § 2000e-3. For these reasons, the opinion by the Court of Appeals in direct conflict with the intent of 42 U.S.C. § 2000e-3 and the case law under the statute.

The fact that an employer has no notice of the harassment does not remove any duty of the employer to prevent the harassment from occurring. *Vinson v. Taylor* 753 F.2d

141, 149-151 (D.C. Cir. 1985) *cert. granted, Meritor Savings Bank FSB v. Vinson* —U.S.—, 106 S.Ct. 57 (1985). But the opinion of the Court of Appeals in the present case holds there is no duty on the part of the City to attempt to create a mechanism to prevent harassment and no duty to protect the victims of harassment.

In *Vinson*, 753 F.2d at 150, the D.C. Circuit discussed the power held by a supervisor over a subordinate employee, power which includes the ability to direct employees in their work, to evaluate and make personnel decisions and is a power which carries the attendant power to coerce, intimidate and harass. The employee-victim who is economically dependant on a job, is now faced with an oppressive and embarrassing problem of harassment. The victim in *Vinson* testified she had been outrageously abused and even raped on the job, but felt forced to endure in silence such misery from fear of losing her job and other acts of possible retaliation against her by her immediate supervisor. *Vinson*, 753 F.2d at 143-144.

If the employer has any duty to its employees, it is not as suggested by the Court of Appeals to file a complaint with EEOC or the Courts as the "expected response" (A-12 n.6), and wait several years for uncertain relief or a "right to sue" letter from EEOC. Given that choice, many employees may choose to suffer their grievances in silence. Instead, the employer's duty is to take affirmative action to discover and investigate harassment.

The only way the corporate-type employer in a large organization will discover harassment is if the harassment is reported by its employees. Studies on the use of an internal grievance mechanism suggests the mere existence of a grievance procedure provides no assurance that it will be

used by employees who may be afraid of further retaliation by the source of their misery.[7] These employees are concerned about retaliation, fear that reporting may be futile, and that they will be blamed or disbelieved.[8]

On the other hand, if the grievance system is sufficiently sensitive, employees are more likely to use it rather than attempt the uncertain, expensive and lengthy route of litigation.[9] Indeed, many employees may decide not to complain if the only avenue is EEOC or the Courts. In the present case, sensitivity was assured by the offer of confidentiality by the City. As stated in *Vinson*, 753 F.2d at 151,

> "Employer responsiveness to on-the-job discrimination at the supervisory level is an essential aspect of the remedial scheme embodied in Title VII. It is the employer alone who is able promptly and effectively to halt discriminatory practices by supervisory personnel . . . Much of the promise of Title VII will become empty if victims of unlawful discrimination cannot secure redress from the only source capable of providing it."

To hold that nothing in 42 U.S.C. § 2000e-3 prevents disclosure of the confidential identities of the complainants in this case, is to strip away the only means by which an employer may hope to uncover harassment and discrimination before the affected individuals suffer serious injury, regardless of whether the victims decide to later seek redress in the courts or suffer their misery and oppression in painful silence.

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[7]*See* Educational Fund for Individual Rights, *Resolving EEO Disputes Without Litigation* (1984).

[8]House Subcomm. on Investigation of Comm. on Post Office and Civil Service, 96th Cong. 2d Session, *Sexual Harassment in the Federal Government*, (Comm. Print 1980).

[9]*See* Rowe, The Non-Union Complaint System at MIT: An Upward-Feedback Mediation Model, 2 Alternatives to the High Cost of Litigation 10(1984); Rowe and Baker, *Are You Hearing Enough Employee Concerns?* 62 Harv. Bus. Rev. 127 (1984).

CONCLUSION

For these Important Reasons the Petitioners respectfully request this Honorable Court to grant this Writ of Certoriari to set this cause for argument before this Court, and that the judgment of the Court of Appeals and the District Court be reversed.

Respectfully Submitted

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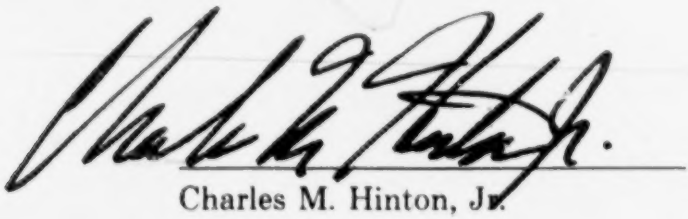
214-494-7216

Attorneys for Petitioner

CERTIFICATE OF SERVICE

This certifies that I, Charles M. Hinton, Jr., a member of the Bar of this Supreme Court, on the 17th day of April, 1986, performed service on Respondent by placing in the mail, postage prepaid, certified mail, return receipt requested, 3 copies of this Petition For Writ of Certoriari, together with copies of all accompanying documents properly addressed to Ronald Deutsch, 1100 Glen Lakes Tower, 900 North Central Expressway, Dallas, Texas 75231, the attorney who represents Respondent Whitaker.



Charles M. Hinton, Jr.

APPENDIX A

I. Decision of United States
Court of Appeals December 10, 1985, 778 F.2d 216
(A-1 through A-15)

II. Judgment of Court of Appeals
(A-16)

III. Appendix B contains Order
Denying Motion for Rehearing
January 14, 1986

Dean WHITAKER, Plaintiff-Appellee,

v.

Nancy C. CARNEY, Director of Employee Relations for the City of Garland, et al., Defendants-Appellants

No. 84-1685.

United States Court of Appeals,
Fifth Circuit.

December 10, 1985

Former city employee filed mandamus action in state court to enforce a request for access to sexual harrassment complaints filed with city against him by certain female employees, and city and its officials removed the action to federal district court. The United States District Court for the Northern District of Texas, A. Joe Fish, J., determined the action had been improperly removed and remanded to state court, and city and its officials appealed. The Court of Appeals, Garwood, Circuit Judge, held that: (1) Court could review District Court's remand order due to fact that removal had been under federal civil rights removal statute; (2) Title VII of the Civil Rights Act of 1964 imposed no obligation on city and its officials to refuse to disclose to former city employee any material aspects of sexual harassment complaints lodged against former city employee; and (3) Title VII thus provided no basis for attempted removal of state mandamus action to federal District Court under federal civil rights removal statute.

Affirmed.

1. Removal of Cases 107(9)

Under 28 U.S.C.A. § 1447(d), Court of Appeals could review district court order remanding to state court case removed to federal district court under federal civil rights removal statute, 28 U.S.C.A. § 1443(2).

2. Removal of Cases 107(9)

Decisional rule that any review of remand orders must be by mandamus instead of appeal does not apply to orders remanding cases properly or improperly removed under federal civil rights removal statute, 28 U.S.C.A. § 1443; limiting *Thermtron Products Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542 and *Royal v. State Farm Fire and Casualty Co.*, 685 F.2d 124.

3. Civil Rights 9.14

Title VII of the Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq., does not prevent an employer from disclosing to an employee about whom complaint is made any material aspects of sexual harassment complaints lodged against that employee under employer's grievance procedure.

4. Civil Rights 9.14

Title VII of the Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq. places no affirmative requirement upon an employer to institute or maintain an anonymous and confidential grievance procedure.

5. Civil Rights 9.14

Title VII of the Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq. does not confer obligation on employers to see to it that their employees are free of sexual harassment or discrimination by nonemployees outside the workplace.

6. Master and Servant 30(6.5)

Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a), preventing employer from retaliating against employee who has opposed any practice made an unlawful employment practice by the Act or who has made a charge, testified, assisted, or participated in any proceeding under the Act, does not impose on employer a duty to prevent nonworkplace retaliation by those who are not its employees.

7. Civil Rights 32(2)
Records 31

Admonition of Civil Rights Act of 1964, § 706(a), 42 U.S.C.A. § 2000e-5(b), requiring that EEOC informal conciliation efforts be kept confidential, by its own terms does not extend to employers and does not preclude release of identities of complainants or of complaints themselves to the parties; only release of such information by EEOC or its employees to the public is proscribed.

8. Removal of Cases 70

Title VII of the Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq. provided no basis for attempted removal to federal court under federal civil rights removal statute, 28 U.S.C.A. § 1443(2), of state mandamus action by former city employee seeking to enforce request for access to sexual harassment complaints filed with city against him by certain female city employees, on ground that to comply with document request would be an act "inconsistent with" a law "providing for equal rights," in that city had no obligation under Title VII to prevent disclosure of the sexual harassment complaints.

Charles M. Hinton, Jr., City Atty., Garland, Tex., for defendants-appellants.

True & McLain, Ronald E. Deutsch, Daniel B. Jones, Dallas, Tex., for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before WISDOM, GARWOOD and W. EUGENE DAVIS, Circuit Judges.

GARWOOD, Circuit Judge:

This appeal requires that we determine whether the federal civil rights removal statute, 28 U.S.C. § 1443(2), was appropriately invoked. Appellants, the City of Garland, Texas (the "City"), and certain of its officials, removed appellee's state mandamus action against appellants, in which appellee sought to enforce a request for access to certain personnel records of the City, under the Texas Open Records Act. Appellants in the removal proceedings asserted that compliance with appellee's request would constitute an act "inconsistent with" the City's Title VII duties as an employer respecting provision of a workplace free of sexual discrimination. The federal district court determined that the case had been improperly removed, and remanded it to the state court. We affirm.

Facts and Proceedings Below

Appellee, Dean Whitaker, was the Director of Accounting for the City. Appellants are the City, and Nancy Carney and Dean Ransom, the City's Director of Employee Relations and Assistant City Manager, respectively. The City set up a grievance procedure to consider informally complaints of sexual harassment brought by its employees. Part of this procedure provided for the confidentiality of the complainants' identities, ostensibly to encourage victims to come forward without fear of retaliation or embarrassment.

Carney and Ransom received in their official capacities a number of complaints from some of Whitaker's City employee female subordinates, which alleged sexual harassment by him. Carney and Ransom began an informal investigation pursuant to the City's grievance procedure. "Due to the highly sensitive nature of the investigation," Ransom hired David Mitchell, an investigator otherwise unidentified in the record, "to interview the employees claiming to be aggrieved." Whitaker claims that Mitchell "assembled a file of written interview statements from the various employees ... [and] made written memoranda regarding the results of his investigation."[1]

Ransom scheduled a meeting with Whitaker for the morning of March 30, 1983. At that conference, Ransom "discussed in general the allegations and ... evidence against [Whitaker]," who asserts that Ransom's "accusations forced [him] to submit his written resignation ... under the reasonable belief and expectation that his position would be terminated 'but for' his resignation." The City denies that it coerced Whitaker's resignation, characterizing it as "voluntarily" submitted.

Following his resignation, Whitaker made demand through counsel for all the documentary information which he alleged the City had assembled. On January 16, 1984, Assistant City Attorney Karen Brophy responded by letter to the request of Whitaker's counsel (apparently following a meeting with that counsel); she denied Whitaker access to whatever evidence respecting the complaints might be con-

[1]The City apparently denies that it received such written documents from Mitchell, claiming that "Mitchell made no final report, no conclusions or recommendations." Ransom also denies preparing a file containing documentary evidence concerning the complaints, as Whitaker's state complaint alleged.

tained in the City personnel records, asserting that "[t]he City is obligated to protect employees who report Title VII violations."[2] Whitaker thereafter filed a mandamus action in the state district court in Dallas County, seeking to compel the production of the alleged documentary evidence under the Texas Open Records Act.[3] *See* Tex. Rev.Civ.Stat.Ann. art. 6252-17a, § 8 (Vernon Supp.1985) (hereinafter "Open Records Act"). When the mandamus was filed, over ten months had elapsed since Whitaker had left the City's employment. Apparently none of the City employees who complained of Whitaker ever filed any charge in respect to such complaints with the Equal Employment Opportunity Commission ("EEOC") or with any state agency serving a similar function. The 180-day period for filing such complaints with the EEOC had expired when Whitaker's mandamus was filed. *See* 42 U.S.C. § 2000e-5(e).

The City removed the mandamus case to the United States District Court for the Northern District of Texas, Dallas Division, pursuant to the federal civil rights removal statute, 28 U.S.C. § 1443(2), which provides in pertinent part:

> "Any of the following civil actions or criminal prosecution, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

---

[2]Brophy apparently had previously offered to read to Whitaker "statements of employees," but such offer was apparently declined. The City Attorney declined to offer or supply copies of these statements because "the statements were so interwoven with job references it is impossible to cloak identities."

[3]The City maintains such evidence, to whatever extent it exists, is not a part of Whitaker's personnel file, which is, under the Texas Act, the only such file to which Whitaker might clearly obtain access. *See* Tex.Rev.Civ.Stat.Ann. art. 6252-17a, § 3(a)(2), (3) (Vernon Supp.1985).

"...

"(2) For any act under color of authority derived from any law providing for equal rights, *or for refusing to do any act on the ground that it would be inconsistent with such law.*" (Emphasis added.)

The City maintains that removal was proper under subsection 2 of section 1443, because its disclosure of the identities of those who had complained of Whitaker would, it asserts, be "inconsistent" with what the City claims is its affirmative Title VII duty to protect its employees from sexual harassment. The City argues in this connection that its grievance procedure had assured anonymity to employee complainants and that disclosure would have a "chilling effect" on the proper functioning of the grievance procedure.

The district court determined that the City had improperly removed the case, and, without written reasons, remanded it to the state court. The City timely appealed. It sought and obtained from the district court a stay of the remand order pending appeal.

Appellate Jurisdiction

[1, 2] An order remanding a removed case to state court is ordinarily not reviewable by appeal. 28 U.S.C. § 1447(d); *see also In re Shell Oil Co.*, 631 F.2d 1156, 1157 (5th Cir.1980). But 28 U.S.C. § 1447(d) excepts from this general rule of nonappealability those orders which remand cases that were removed to federal court under the federal civil rights removal statute.[4] Appellants based their removal expressly

[4]Section 1447(d) provides:

"An order remanding the case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise."

upon section 1443(2). This Court may therefore review the district court's remand order. *State of Texas v. Gulf Water Benefaction Co.*, 679 F.2d 85, 86 (5th Cir.1982). *See also* 14A Wright, Miller & Cooper, *Federal Practice and Procedure* § 3740 (1985).[5]

---

[5]In *Royal v. State Farm Fire and Casualty Co.*, 685 F.2d 124, 126 (5th Cir.1982), this Court, relying on *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976), stated that "a remand order, alone, does not ordinarily constitute a final, appealable judgment; accordingly, review of such an order, when permitted, should be by mandamus rather than direct appeal." However, neither *Royal* nor *Thermtron* dealt with remand of a case purportedly removed under section 1443. *Thermtron* held that the *first* clause of section 1447(d) did not preclude review of an order remanding a case which had been removed under section 1441(a) on grounds of diversity of citizenship, where the remand order was expressly and entirely based on grounds other than those stated in section 1447(c), the grounds in *Thermtron* being the crowded condition of the federal district court's docket. Review by mandamus was granted in *Thermtron*, the Court noting that mandamus was appropriate since, under prior holdings, a remand order "does not represent a final judgment reviewable by appeal." 96 S.Ct. at 594. In *Royal*, removal was likewise not under section 1443, but rather was under section 1441(a), being based on diversity. The *Royal* remand order was challenged on the basis of the *Thermtron* judicial exception to the nonreviewability provision of the *first* clause of section 1447(d). *Royal* stated that such a challenge could be raised only by mandamus; but that even if we treated the appeal as a petition for mandamus, relief would nevertheless be denied since the remand order did not *purport* to be based on grounds not cognizable under section 1447(c) and the case was hence not within the *Thermtron* exception to the first clause of section 1447(d). 685 F.2d at 126.

By contrast, in the present case, removal *was* purportedly based on section 1443, and hence we are concerned, as *Thermtron* and *Royal* were not, with the *second* clause of section 1447(d) which expressly provides that remand orders of cases removed under section 1443 "shall be reviewable *by appeal* or otherwise." (Emphasis added.) This portion of section 1447(d) was added in 1964, *see Thermtron*, 96 S.Ct. at 598 n. 7, and under it the Supreme Court has on several occasions reviewed *appeals* from orders remanding cases which had been removed under section 1443. *See State of Georgia v. Rachel*, 384 U.S. 780, 86 S.Ct. 1783, 1786, 16 L.Ed.2d 925 (1966), *affirming Rachel v. State of Georgia*, 342 F.2d 336, 337 & n. 1 (5th Cir.1965); *City of Greenwood, Mississippi v. Peacock*, 384 U.S. 808, 86 S.Ct. 1800, 1804-05, 16 L.Ed.2d 944 (1966), *reversing Weathers v. City of Greenwood, Mississippi*, 347 F.2d 986 (5th Cir.1965) and *Peacock v. City of Greenwood Mississippi*, 347 F.2d 679 (5th Cir.1965); *Johnson v. Mississ-*

Title VII Duties of an Employer

[3] Appellants assert that Title VII places upon them an affirmative duty to maintain a workplace free of sexual harassment. *See* 42 U.S.C. §§ 2000e-2(a), 2000e-3(a); 29 C.F.R. § 1604.11. The City argues that this general duty leads in turn to an obligation to institute a workable grievance procedure for complaints of Title VII violations. Without passing on whether, or to what extent, such an obligation exists under Title VII, we are in any event unable to agree with appellants' further contention that Title VII includes an obligation to refuse to disclose to the employee about whom complaint is made any material aspects of sexual harassment complaints lodged against that employee under the employer's grievance procedure.

We simply can find no statutory or regulatory language which imposes such a duty. Section 2000e-2 provides only that:

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ippi, 421 U.S. 213, 95 S.Ct. 1591, 1595, 44 L.Ed.2d 121 (1975), *affirming Johnson v. Mississippi*, 488 F.2d 284 (5th Cir.1974). *Thermtron* made no reference to the holdings in these cases, as it doubtless would have if the Court had there intended to hold that after the 1964 amendment to section 1447(d) orders remanding cases removed under section 1443 could not be reviewed by appeal but only by mandamus. Further, numerous decision of this Court have held that such orders can be reviewed by appeal. *See, e.g., Robinson v. State of Florida*, 345 F.2d 133, 134 (5th Cir.1965); *Congress of Racial Equality v. Town of Clinton*, 346 F.2d 911, 913-14 (5th Cir.1964); *Sunflower County Colored Baptist Association v. Trustees of Indianola Municipal Separate School District*, 369 F.2d 795 (5th Cir.1966); *Varney v. State of Georgia*, 446 F.2d 1368 (5th Cir.1971). We have so held following *Thermtron*. *See Robertson v. Ball*, 534 F.2d 63 (5th Cir.1976) (which cites *Thermtron*); *State of Texas v. Gulf Water Benefaction Co.*, 679 F.2d 85, 86 (5th Cir.1982); *Smith v. Winter*, 717 F.2d 191 (5th Cir.1983). The above-cited decisions, many of which affirmed the remand, obviously do not turn on whether the section 1443 removal was proper. In *Royal*, we did not purport to disapprove of any of these cases. Consequently, we construe the statements in *Thermtron* and *Royal* to the effect that any review of remand orders must be by mandamus instead of appeal as being inapplicable to orders remanding cases removed (properly or not) under section 1443.

> "(a) It shall be an unlawful employment practice for any employer —
>
> > "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.... "

No explicit requirements respecting any specific preventive measures or grievance procedures which might be consistent with the duties outlined in the statute are anywhere to be found in Title VII itself. Nor are the relevant EEOC regulations more helpful. Section 1604.11(a), 29 C.F.R., provides:

> "Harassment on the basis of sex is a violation of Sec. 703 of Title VII [42 U.S.C. § 2000e-2].... Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

With respect to sexual harassment by co-workers, the regulations make the employer responsible "for acts of sexual harassment in the workplace where the employer ... knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." 29 C.F.R. § 1604.11(d). As to sexual harassment by supervi-

sory employees, the regulations state that an employer is "responsible . . . regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence." *Id.*, § (c). Perhaps most important in terms of appellants' contention is subsection (f) of the regulation:

> "Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their rights to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned." 29 C.F.R. § 1604.11(f).

[4] We are not aware of any other relevant provision of the statute or regulations. We find no support either in the statute or in the regulations for appellants' proposition that Title VII or the regulations thereunder *require* employers to maintain a *confidential* grievance procedure.

The statute and the regulations are simply not this specific nor broadly solicitous of potential victims of sexual abuse or other proscribed discrimination. The regulations suggest a variety of affirmative actions to prevent (or to remedy) and otherwise discourage sexual harassment by supervisors or other employees. The particular form such responses may take is nowhere articulated, however, beyond the general examples given in subsection (f) of the regulations. In conspicuous contrast to the statutory sections detailing the EEOC's informal mediation efforts, and the confidentiality which is expressly mandated for *those* pro-

ceedings, there is nowhere in the relevant statute or regulations applicable to the employer any requirement whatever that formal or informal grievance procedures be instituted, or even, should they be instituted, that those proceedings must be kept confidential.[6] We must conclude, therefore, that Title VII places no affirmative requirement upon the employer to institute an anonymous and confidential grievance procedure.

[5, 6] We further observe that Whitaker has not been a City employee ever since a time many months before his mandamus was filed. Title VII nowhere confers an obligation on employers to see to it that their employees are free of sexual harassment or discrimination by non-employees *outside the workplace. Cf.* 29 C.F.R. § 1604.11(e) (indicating that such duty may obtain as to actions of nonemployees *in* the workplace).[7] While it may indeed be true that the City's grievance procedure would work more optimally were the complainants' identities (and perhaps the complainants themselves) kept confidential, nonetheless, as previously stated, we find no indication in the statute or regulations that such anonymity is *required.* Moreover, there is no indication that the statute intended that particular employer

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[6]Indeed, the regulation specifically implies that Title VII actions through EEOC or the courts, where appropriate, are an expected response, and so places a duty upon the employer to inform its employees of "their right to raise and how to raise" Title VII harassment complaints. 29 C.F.R. § 1604.11(f).

[7]42 U.S.C. § 2000e-3(a) provides:

> "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

This prevents the employer from retaliating; it does not impose on the employer a duty to prevent nonworkplace retaliation by those who are not its employees.

choices of methods to prevent sexual discrimination in employment would necessarily displace *other* affirmative legal obligations which the employer might have under federal or state laws — including compliance with state open records acts. Finally, absent at least some express indication in the statute, we are disinclined to infer a requirement that a party accused of wrongdoing be kept ignorant of the identity of the accusers and the nature of their accusations, a practice which at least in most contexts runs so against the grain of our traditional notions of fairness.

[7] We are not persuaded by the City's attempted analogy to the express statutory requirement that EEOC informal conciliation efforts be confidential: "Nothing said or done during and as part of such informal endeavors [*i.e.*, conciliation efforts] may be made *public by the* [Equal Employment Opportunity] *Commission*, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned." 42 U.S.C. § 2000e-5(b) (emphasis added).[8] This admonition does not by its terms extend to employers. The desire for confidentiality on the part of the EEOC is presumably to encourage settlement of grievances by the parties. Finally, we note that even the prescription for EEOC discreetness respecting its informal mediation efforts does not preclude release of the identities of complainants or of the complaints themselves to the *parties;* rather, only release of such information *by the Com-*

[8]This section also provides that complainants' charges "shall not be made public by the Commission." But the statute does require that *notice* of charges be made to the employer, *i.e.*, the object of the complaint, and the statute nowhere requires the anonymity of the complainant. Moreover, the section makes violation of this instruction that neither the Commission nor any of its officers or employees make *public* the relevant evidence or charges a criminal violation of the statute. *See* 42 U.S.C. §§ 2000e-5(b), 2000e-8(e) ("unlawful for any officer or employee of the Commission to make public").

mission or its employees to the public is proscribed. Appellants' analogy to the EEOC duty of confidentiality this fails completely.[9]

Conclusion

[8] We determine that Title VII does not prevent an employer from disclosing to the complained of individual sexual harassment in employment complaints made to the employer by its employees. Consequently, Title VII provides no basis for appellants' attempted removal to federal court under the federal civil rights removal statute, 28 U.S.C. § 1443(2), on the asserted ground that to comply with appellee's state Open Records Act request would be an act "inconsistent with" a law "providing for equal rights."[10]

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[9]We note that appellants have made no showing that Whitaker's request is, in any event, appropriate and enforceable under the Texas Open Records Act. As the City pointed out in its Original Answer to the Complaint, filed in the federal court, appellee Whitaker has apparently not satisfied several of the Texas Act's prerequisites, including having made a written request, *see* Open Records Act, § 4, and having sought access to the records through the proper legal custodian of those records. *See id.*, § 5(a). Nor does it appear that the Attorney General of Texas has passed upon the question, a process which the City may timely request and which may be controlling of the disposition of Whitaker's request, even were it properly tendered. *Id.*, § 7. Even were there none of these impediments, it is not clear that the information and/or records sought by Whitaker are necessarily of a type to which he may obtain access under the terms of the Texas Act. *See id.*, § 3(a)(2), (3). *See also* note 3, *supra*. This entire question may thus be mooted by the state court's disposition of Whitaker's request. *See, e.g., Sunflower County Colored Baptist Association v. Trustees of Indianola Municipal Separate School District*, 369 F.2d 795, 797-98 (5th Cir.1966) (remand of case removed under section 1443(1) was proper where enforcement of state statute was not shown to necessarily "expressly deny" any federal right).

[10]Thus we do not reach the issue of whether, as applied to this case where only the Title VII sex discrimination provisions are invoked, Title VII is a "law providing for equal rights" within the meaning of section 1443(2). *See, e.g., City of Greenwood, Mississippi v. Peacock*, 384 U.S. 808, 86 S.Ct. 1800, 1810 n. 22, 16 L.Ed.2d 944 (1966). Likewise, we do not reach the

Accordingly, the order of the district court remanding the case to the state court is AFFIRMED.

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question of whether the City and its officials, defending a state mandamus suit by an allegedly aggrieved party on the grounds that the relief sought is prohibited by Title VII provisions applicable to all employers, are in this context the kind of officials intended to be protected by section 1443(2). *See Detroit Police Lieutenants and Sergeants Association v. City of Detroit*, 597 F.2d 566, 568 (6th Cir.1979).

U.S. District Court
Northern District of Texas
FILED
January 31, 1986
Nancy Hall Doherty, Clerk
Deputy

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-1685
Summary Calendar

D.C. Docket No. CA-3-84-0416-G

DEAN WHITAKER,
Plaintiff-Appellee,

versus

NANCY C. CARNEY, Director of
Employee Relations for the
City of GARLAND, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas

Before WISDOM, GARWOOD and DAVIS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from in this cause is affirmed.

IT IS FURTHER ORDERED that defendants-appellants pay to plaintiff-appellee the costs on appeal, to be taxed by the Clerk of this Court.

December 10, 1985

ISSUED AS MANDATE: January 28, 1986

APPENDIX B

Order Denying Motion for Rehearing
of the United States Court of Appeals
For the Fifth Circuit
January 14, 1986

U.S. District Court of Appeals
FILED
January 14, 1986
Gilbert F. Ganucheau
Clerk

In The
UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

No. 84-1685

DEAN WHITAKER,

Plaintiff-Appellee,

versus

NANCY C. CARNEY, Director of
Employee Relations for the
City of GARLAND, ET AL.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC
(Opinion 12/10/85, 5 Cir., 198__, _____ F.2d ____)
(January 14, 1986)

Before WISDOM, GARWOOD and DAVIS, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

Garwood

United States Circuit Judge

APPENDIX C

Order of the District Court
July 13, 1984

U.S. District Court
Northern District of Texas
FILED
July 13, 1984
Nancy Hall Doherty
Clerk

In The
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA 3-84-0416-G

DEAN WHITAKER,

Plaintiff,

vs.

NANCY C. CARNEY, Director of Employee Relations for the City of Garland, DEAN RANSOM, Assistant City Manager, and THE CITY OF GARLAND,

Defendants.

ORDER

This cause having come on for hearing on the motion of plaintiff to remand to the 162nd Judicial District Court of Dallas County, Texas and the court having considered the affidavits in support of and in opposition to the motion, and having heard the argument of counsel, and having read and examined the briefs submitted by the parties, on the basis thereof and on all records, files and proceedings herein and it appearing to the court that this case was improperly

removed to this court in that federal jurisdiction was lacking over this matter pursuant to 28 U.S.C. § 1447(c), it is hereby

ORDERED that the plaintiff's motion be and the same hereby is **GRANTED** and that this cause be **REMANDED** to the 162nd Judicial District Court of Dallas County, Texas; and that a certified copy of this order be mailed by the clerk of this court to the clerk of the district courts of Dallas County, Texas.

All costs of court are taxed against the defendants.

July 13, 1984.

A. JOE FISH

A. JOE FISH
United States District Judge

APPENDIX D

Constitution, Acts, Statutes,
Rules, and Regulations.

FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 5. Power to enforce amendment.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

TITLE VII

§ 2000e-3. Other unlawful employment practices

(a) Discrimination on account of opposition to unlawful practices or participation in investigation, proceeding, or hearing. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title [42 USCS §§ 2000e-2000e-17], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title [42 USCS §§ 2000e-2000e-17].

§ 1443. Civil rights cases

Any of the following civil actions or criminals prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

(June 25, 1948, c. 646, § 1, 62 Stat. 938.)

42 U.S.C. § 2000e-2. Discrimination because of race, color, religion, sex, or national origin

(a) Employers. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§ 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443, of this title [28 USCS § 1443] shall be reviewable by appeal or otherwise.

(June 25, 1948, c. 646, § 1, 62 Stat. 939; May 24, 1949, c. 139, § 84, 63 Stat. 102; July 2, 1964, P. L. 88-352, Title IX, § 901, 78 Stat. 266.)

Art. 6252-17a. Access by public to information in custody of governmental agencies and bodies

Public information

Sec. 3. (a) All information collected, assembled, or maintained by governmental bodies pursuant to law or ordinance or in connection with the transaction of official business is public information and available to the public during normal business hours of any governmental body, with the following exceptions only:

(1) information deemed confidential by law, either Constitutional, statutory, or by judicial decision;

(2) information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; provided, however, that all information in personnel files of an individual employee within a governmental body is to be made available to that individual employee or his designated representative as is public information under this Act;

(3) information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection;

Application for public information

Sec. 4. On application for public information to the custodian of information in a governmental body by any person, the custodian shall promptly produce such information for inspection or duplication, or both, in the offices of the governmental body. If the information is in active use or in

storage and, therefore, not available at the time a person asks to examine it, the custodian shall certify this fact in writing to the applicant and set a date and hour within a reasonable time when the record will be available for the exercise of the right given by this Act. Nothing in this Act shall authorize any person to remove original copies of public records from the offices of any governmental body without the written permission of the custodian of the records.

Custodian of public records described

Sec. 5. (a) The chief administrative officer of the governmental body shall be the custodian of public records, and the custodian shall be responsible for the preservation and care of the public records of the governmental body. It shall be the duty of the custodian of public records, subject to penalties provided in this Act, to see that the public records are made available for public inspection and copying; that the records are carefully protected and preserved from deterioration, alteration, mutilation, loss, removal, or destruction; and that public records are repaired, renovated, or rebound when necessary to preserve them properly. When records are no longer currently in use, it shall be within the discretion of the agency to determine a period of time for which said records will be preserved.

(b) Neither the custodian nor his agent who controls the use of public records shall make any inquiry of any person who applies for inspection or copying of public records beyond the purpose of establishing proper identification and the public records being requested; and the custodian or his agent shall give, grant, and extend to the person requesting public records all reasonable comfort and facility for the full exercise of the right granted by this Act.

Attorney general opinions

Sec. 7. (a) If a governmental body receives a written request for information which it considers within one of the exceptions stated in Section 3 of this Act, but there has been no previous determination that it falls within one of the exceptions, the governmental body within a reasonable time, no later than ten days, after receiving a written request must request a decision from the attorney general to determine whether the information is within that exception. If a decision is not so requested, the information shall be presumed to be public information.

(b) The attorney general shall forthwith render a decision, consistent with standards of due process, to determine whether the requested information is a public record or within one of the above stated exceptions. The specific information requested shall be supplied to the attorney general but shall not be disclosed until a final determination has been made. The attorney general shall issue a written opinion based upon the determination made on the request.

Writ of mandamus

Sec. 8. If a governmental body refuses to request an attorney general's decision as provided in this Act, or to supply public information or information which the attorney general has determined to be a public record, the person requesting the information or the attorney general may seek a writ of mandamus compelling the governmental body to make the information available for public inspection.

Distribution of confidential information prohibited

Sec. 10. (a) Information deemed confidential under the terms of this Act shall not be distributed.

(b) A custodian of public records, or his agent, commits an offense if, with criminal negligence, he or his agent fails or

refuses to give access to, or to permit or provide copying of, public records to any person upon request as provided in this Act.

(c) It is an affirmative defense to prosecution under Subsection (b) of this section that the custodian of public records reasonably believed that the public records sought were not required to be made available to the public and that he:

(1) acted in reasonable reliance upon a court order or a written interpretation of this Act contained in an opinion of a court record or of the attorney general issued under Section 7 of this Act;

(2) requested a decision from the attorney general in accordance with Section 7 of this Act, and that such decision is pending; or

(3) within three working days of the receipt of a decision by the attorney general that the information is public, filed a cause of action seeking relief from compliance with such decision of the attorney general, and that such cause is pending.

(d) It is an affirmative defense to prosecution under Subsection (b) of this section that the defendant is the agent of a custodian of public records and that the agent reasonably relied on the written instruction of the custodian of public records not to disclose the public records requested.

(e) Any person who violates Section 10(a) or 10(b) of this Act shall be deemed guilty of a misdemeanor and upon conviction shall be punished by confinement in the county jail not to exceed six (6) months or fined in an amount not to exceed $1,000, or by both such fine and confinement. A violation under this section constitutes official misconduct.